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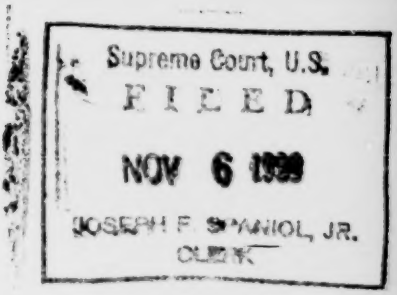

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD HAMM; Petitioner,

vs

STATE OF NEW JERSEY; Respondant.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

Counsel And Member of the
Bar of The United States
Supreme Court

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QUESTIONS PRESENTED

1. DO THE PENALTIES THAT THE PETITIONER FACES AS A RESULT OF A CONVICTION FOR A THIRD OFFENSE VIOLATION OF N.J.S.A. 39:4-50 CONSTITUTE SERIOUS PENALTIES WHICH ENTITLE THE PETITIONER TO A JURY TRIAL?

A.
IF THE PETITIONER IS NOT PRESUMPTIVELY ENTITLED TO A JURY TRIAL DOES THE SEVERITY OF THE PENALTIES FACED BY PETITIONER CLEARLY REFLECT A COMMITMENT BY THE NEW JERSEY LEGISLATURE THAT N.J.S.A. 39:4-50 IS SERIOUS?

B.
DOES THE PETITIONER, A THIRD OFFENDER, FACE INCARCERATION WHICH PRESUMPTIVELY GUARANTEES HIM A JURY TRIAL?

LIST OF PARTIES BEFORE NEW JERSEY SUPREME COURT

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DONALD HAMM; Petitioner,

vs

STATE OF NEW JERSEY; Respondant.

JURISDICTIONAL STATEMENT

Petitioner, Donald Hamm,[1] appeals from the final judgment of the Supreme Court of New Jersey, entered on August 6, 1990 denying petitioners assertion that the Sixth Amendment to the United State's Constitution requires that petioner be entitled to a jury trial.

Petitioner asserts that the New Jersey Supreme Court improperly interprets this Court's determination of the petitioners Sixth Amendment right to be tried by a jury of petitioner's peers where the petitioner faces serious penalties, which constitute consequences of magnitude.

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1. Hereinafter noted as petitioner.

JURISDICTION

The judgment of the New Jersey Supreme Court denying the petitioner's assertion that he has a right to be tried by a jury of his peers was ordered on August 6, 1990.

The notice of appeal to this Court was filed within 90 days of the final judgment below.

The jurisdiction of this Court is invoked under 28 USC Sec 1257(a). The Petitioner asserts that the New Jersey Supreme Court's ruling precluding the petitioner from a jury of his peers is repugnant to the Sixth Amendment of the United States as applied to New Jersey through the Fourteenth Amendment. The New Jersey Supreme Court's decision below deprives the petitioner of his federal Sixth Amendment right to a jury trial.

Petitioner believes that 28 USC Sec 2403(b) applies and complies with same. The New Jersey Supreme Court is the Court of last resort in New Jersey.

The New Jersey Supreme Court agreed that this issue is posed as one of a federally guaranteed constitutional right and thus was properly presented and preserved below. See PA2. Spies v Illinois, 123 US 131, 31 L Ed 80, 8 S Ct 22 (1887).

The issue presented is one of a nationwide significance. The issue presented involves a substantial federal question. The New Jersey Supreme Court indicates when citing Blanton v City of North Las Vegas, 489 US ___, 103 L Ed 2d 550, 109 S Ct ___ (1989) that,

> In the wake of Blanton the Court has given no indication of what criteria it may invoke in the future to give content to the expression serious.

Thus the New Jersey Supreme court seems to strike out into virgin territory. Just what constitutes a serious

penalty? The petitioner asserts that the panoply of penalties faced by himself before trial are serious. (See Statement of Case for extensive list of penalties faced by petitioner). Thus, what does this Court consider to be serious enough? The petitioner relies upon this Court as the final authority regarding the seriousness of the penalties that faced him. Pennekamp v Florida, 328 US 331, 90 L Ed 1295, 66 S Ct 1029 (1946).

As the New Jersey Supreme Court admits other courts have concluded that DWI is a serious offense requiring a jury trial.

> In this business of drawing lines, we claim no monopoly on constitutional wisdom. Other Courts have concluded that DWI is a serious offense requiring a jury trial. See, e.g. Richter v Fairbanks, 903 F 2d 1202 (8th Cir. 1990) (jury trial required under Blanton when maximum imprisonment six months but $500 fine and fifteen-year driver's license revocation also mandated); United States v Craner, 652 F 2d 23 (9th Cir. 1981) (jury trial required when defendant faced possible six month imprisonment and $500 fine under federal law, and six-month license revocation under state law); State v. O'Brien, 68 Haw 38, 704 P 2d 883 (1985) (jury trial required despite six-month limit on imprisonment because mix of punishments signaled seriousness).

However, petitioner admits there is an apparent split of authority within the federal courts. See Landry v Hoepfner, 840 F 2d 1201 (5th Cir. 1988) (en banc), cert. denied, ___ US ___, 103 L Ed 2d 866 (1989). But, it must be noted that originally the 5th Circuit Court granted Landry a jury trial. Landry v Hoepfner, 818 F 2d 1169 (5th Cir. 1987). Although, this Court denied certiorari on

Landry, the petitioner asserts that given the split of authority regarding what constitutes serious penalties, (even within the 5th Circuit itself), the split supports the petitioners contention that this Court grant petitioner's request for certiorari.

Additionally, it appears, at least implicitly, that the New Jersey Supreme Court wished further guidance from this Court regarding what constitutes serious. The New Jersey Supreme Court stated, after admitting that there was a split of authority, that, "it may be that the Supreme Court will draw a bright line to guide states in DWI cases." PA23.

Thus petitioner asserts that the question presented is of a novel issue of interpretation of the federal constitution. The question presents a substantial federal issue. The issue presents one not previously considered by this Court. See Blanton v City of North Las Vagas, Nevada, supra. at 489 US ___, 103 L Ed 2d 558, footnote 12 where this Court stated,

> In light of petitioners' status as first-time offenders, we do not consider whether a repeat offender facing enhanced penalties may state a constitutional claim because of the absence of a jury trial in a prior DWI prosecution.

Petitioner asserts that the various interpretations by Courts across the country, agreeing with defendants' contentions that DWI penalties are serious cries out for this Court to interpret the affect of the failure of the New Jersey Supreme Court to properly characterize the penalties faced by this petitioner as serious enough to grant him his Sixth Amendment right to a jury trial.

The petitioner will rely upon the Sixth, and Fourteenth Amendments to the Constitution of the United States. [1]

1. For the full text of the provisions relied upon by the petitioner see PA51.

STATEMENT OF THE CASE

The petitioner was arrested for violation of N.J.S.A. 39:4-50, [DWI] and N.J.S.A. 39:4-50.2, [refusal to submit to a breath test], on August, 1986 in the Boro of Marlboro. The petitioner retained the services of the firm of Francis X. Moore, P.A., who filed an appearance and not guilty plea on the defendant's behalf.

The petitioner appeared for trial before the Honorable James Newman, J.M.C. Before trial, the petitioner asserted his Federal Sixth Amendment Constitutional right to be tried by a jury of his peers. See PA30. As a potential third offender under the enhanced penalty portion of N.J.S.A. 39:4-50 the petitioner faced the following consequences of magnitude. [1]

1. A $1,000.00 Fine;

2. A $100.00 enforcement surcharge. N.J.S.A. 39:4-50.8

3. Court costs of $15.00;

4. Not less then 180 days of Jail; 4(a). N.J.S.A. 39:4-51 provides that a person convicted of violating 39:4-50, who

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1. Additionally the New Jersey Legislature passed an amendment to N.J.S.A. 2C:4-2, L. 1990, c. 64; commonly know as the Violent Crimes Compensation Penalty, which added a violent crimes compensation penalty of $30.00 to violations of N.J.S.A. 39:4-50 committed after July 17, 1990.

The amendment brought the State of New Jersey into compliance with the federal "Violent Crimes Act of 1984," (42 USC Sec. 10601), which was revised in 1988 to ensure that victims of drunk driving must be eligible for compensation. Senate Judiciary Statement, Senate, Nos. 2348 and 2635-L. 1990, c. 64.

has been imprisoned in a county jail or workhouse, "shall not, after commitment, be released therefrom until the term of imprisonment has been served."

5. A ten year drivers license revocation; (a). Suspension or revocation for an unlimited period of time by the Director of Motor Vehicles for violations of provisions of Title 39. N.J.S.A. 39:5-30. The Director is permitted to refuse to restore a license notwithstanding the fact that a period of mandatory suspension has expired. Vance v State, 67 NJ Super 63 (AD 1961).

(b). Reexamination to determine his ability to operate a motor vehicle before having any driving privilege restored. N.J.S.A. 39:5-30(f).

(c). Loss of any reciprocal driving privilege. N.J.S.A. 39:5-30.

6. A $1,000.00 per year for three year Insurance Surcharge, which if not paid on a timely basis results in an indefinite license revocation. N.J.S.A. 17:20A-35(b)(2).

(a). A license suspension will continue until the surcharge is paid. N.J.A.C. 13:19-12.1.

(b). Cancellation of insurance by reason of his license suspension. N.J.S.A. 17:29C-7(A)(b).

(c). Non-renewal of coverage by reason of conviction. N.J.A.C. 11:3-23.8(a)(14).

(d). Forced use of the New Jersey Automobile Joint Underwriters Association for insurance coverage, the only alternative after cancellation or non-renewal of coverage. The JUA is authorized to charge 10% higher premiums to persons "convicted of two or more moving violations within three years of the date of issuing the policy. N.J.S.A. 17:30E-13a to d.

(e). A 35% increase in collision and comprehensive coverage premiums as a "dangerous driver" (one convicted of DWI) under the Driving Improvement Plan of

Operation Authorized by N.J.S.A. 17:30E-6.

7. A $30.00 restoration fee to be paid to the New Jersey Department of Motor vehicle before the Department will restore the petitioner's license. N.J.S.A. 39:3-10a.

8. A $80.00 fee to be paid the New Jersey Department of Alcohol and Countermeasures Bureau, before the DMV will restore the petitioner's drivers license. N.J.S.A. 39:4-50(b).

9. Satisfaction of the Bureau of Alcohol and Countermeasures requirements, which at last regulation includes one year of alcohol treatment, with meetings at least once per week, at the petitioner's expense. Failure to comply means an immediate revocation of the petitioner's driver's license or continued revocation until petitioner comes into compliance. Costs for these programs vary.

Defense Counsel proffers, based on experience, that the costs are generally between $35.00 to $140.00 per session;

10. Enhanced penalties for violation of N.J.S.A. 39:3-40, [driving on the revoked list], including a mandatory extra $500.00 fine, an additional, minimum one year, up to two year license revocation and up to 90 days in jail;

For the violation of N.J.S.A. 39:4-50.2 the petitioner faced:

1. An additional fine of up to $500.00

2. An additional license suspension of 2 years. N.J.S.A. 39:4-50.4(a).

(a). "The revocation shall be independent of any

revocation imposed by virtue of a conviction under the provisions of R.S. 39:4-50." Conviction for refusal is treated as a second offense if the defendant has been convicted of DWI. State v Wilhalme, 206 NJ Super 359 (AD 1985), cert. denied 104 NJ 398 (1986).

3. Court costs of $15.00.

The trial court denied the petitioner's motion.

The trial court relied upon New Jersey Appellate authority as the basis of the denial.

The petitioner proceeded to trial. The trial proceeded almost to conclusion. At a certain point in time the petitioner made a decision to retract his previous plea of not guilty and enter a conditional plea of guilty to the violation of N.J.S.A. 39:4-50.

Pursuant to R. 3:9-3(f), the trial court accepted the conditional plea of guilty, with the consent of the State. The petitioner was sentenced to the following by the trial court: A $1000.00 fine; $15.00 Court Costs; A ten year license revocation; 90 days of community service, [petitioner gets credit for one day if he works six hours], A 28 day inpatient alcohol treatment facility, with outpatient treatment for the remainder of the 62 days on an outpatient basis.

The petitioner then timely filed to both the Superior Court, Law Division, and Appellate Division. The petitioners appeal was denied at both levels.

The petitioner filed for certification before the New Jersey Supreme Court. Certification was granted. State v. Hamm, 117 N.J. 51 (1989).

The New Jersey Supreme Court denied petitioners right to a jury trial on August 6, 1990. State v. Hamm, ___ N.J. ___ (1990).

The petitioner filed the within request for a writ in a timely manner.

THE QUESTION PRESENTED IS SUBSTANTIAL

The petitioner asserts that the question presented by the within request presents a substantial federal question. The New Jersey Supreme Court continually laments against the serious offense of driving under the influence. In the last seven years the New Jersey Supreme Court continually indicates that the devastation on our highways, allegedly caused by drinking drivers, allows the Supreme Court to work in tandem with our legislature to rid the roads of this dangerous, serious criminal.

Yet, how ironic, that in the present case the New Jersey Supreme Court forgets the seriousness with which the Court considers drunk driving and concludes it is only a "petty offense." The New Jersey Supreme Court takes us on a sleigh ride through the legislative history of DWI in our State and surprise of surprise concludes our legislature intends that a drunk driver cannot have a jury trial. See PA 1 to PA 23.

Petitioner asserts that the New Jersey Supreme Court simply fails to apply the appropriate treatment to the penalties the petitioner faced. The question of seriousness surrounds the penalties faced today by the petitioner and the way that society views the offense as seen through the eyes of the elected legislature. Not, as the New Jersey Supreme Court suggests, based on the historical significance of drunk driving penalties and the monetary concerns which the legislature has if more jury trials are allowed. See generally PA11, PA13 and PA20. The New Jersey Supreme Court cites the right authority but fails to follow the case's dictates. "All rules ***, even ancient ones, must satisfy contemporary notions of due process." Burnham v Superior Court of California, 58 USLW 4629, 4636 (1990)(Plurality opinion).

1. DO THE PENALTIES THAT THE PETITIONER FACES AS A RESULT OF A CONVICTION FOR A THIRD OFFENSE VIOLATION OF N.J.S.A. 39:4-50 CONSTITUTE SERIOUS PENALTIES WHICH ENTITLE THE PETITIONER TO A JURY TRIAL?

Yes, the penalties that faced the petitioner when he stood before the trial court are serious and onerous.

Blacks Law Dictionary defines serious as:

A.

IF THE PETITIONER IS NOT PRESUMPTIVELY ENTITLED TO A JURY TRIAL DOES THE SEVERITY OF THE PENALTIES FACED BY PETITIONER CLEARLY REFLECT A COMMITMENT BY THE NEW JERSEY LEGISLATURE THAT N.J.S.A. 39:4-50 IS SERIOUS?

Yes. The Blanton decision indicates that onerous penalties may "puncture the 6-month incarceration line." Blanton v North Las Vegas, supra. at 489 US ___, 103 L Ed 2d 556, 557. This Court states that when performing the proper analysis only those penalties resulting from state action need be considered. State action is defined as penalties mandated by statute or regulation. Id. at 489 US ___, 103 L Ed 2d 557, at footnote 8.

The first obvious penalty must be the potential incarceration facing the petitioner. The maximum incarceration facing a third offender for violation of N.J.S.A. 39:4-50 is as follows: ...and [the defendant] shall be sentenced to imprisonment for a term of not less than 180 days, ...In State v Linnehan, 197 NJ Super 41 (AD 1984), cert. denied 99 NJ 236 (1985) the Appellate Division ruled that despite the apparent language allowing a trial court to sentence in excess of 180 days a trial court that as long as the sentence did not exceed 180 days there was no right to

a jury trial.

Even if one buys this line of logic the petitioner asserts that the wording "not less then 180 days" embodies the legislative intent that this is a serious offense. The seriousness of the incarceration for DWI is enhanced if one considers the other restrictions placed strictly upon incarceration due to a DWI conviction.

N.J.S.A. 39:4-51 provides that a person convicted of violating 39:4-50 for the third time, "shall not, after commitment, be released therefrom until the term of imprisonment imposed has been served." However, a "criminal" incarcerated in New Jersey sentenced to a term of imprisonment for various crimes "shall be released conditionally on parole at or before the expiration of such term" N.J.S.A. 2C:43-9(a). Thus, a person subjected to incarceration for a third offense faces a more restricted term than does some "criminals."

N.J.S.A. 39:4-50(a)(3) states the defendant must be sent to "the county jail, to the workhouse of the county wherein the offense was committed." However, N.J.S.A. 2C:43-10(g) permits all others sentenced to incarceration "to apply for a transfer from one of such county penal institutions to any other." Thus, an Essex County resident convicted in Atlantic County cannot serve his sentence near his relatives and friends. Once again a violator for a third offense is restricted much more then a "criminal" who is sentenced to incarceration.

Additionally, the third offender faces a 10 year license revocation. This must be considered a penalty. The New Jersey Supreme Court asserts that this penalty is lessened in import merely because it is a "civil penalty." The petitioner will face the license suspension for some 9.5 years after he is released from incarceration. This is not petty. This suspension exceeds the suspension faced by Mr. Blanton by 9 years and 270 days.

In Richter v Fairbanks, 903 F 2d 1202 (8th Cir. 1990) the

Circuit Court specifically used the fifteen year license revocation as the factor which required that Mr. Richter be allowed his jury trial. The Court concluded,

> Revocation of a license to operate a motor vehicle very often can work a substantial hardship on its holder. See Argersinger v Hamlin, 407 US 25, 48 (1972) (Powell, J. concurring) (revocation of driver's license "is more serious for some individuals than a brief stay in jail") Criminal Law Reporter, 47 CrL 1209 (June 13, 1990).

It appears that the New Jersey Supreme Court agrees with the Nebraska Supreme Court the revocation "is a terrible burden on the offender." See PA16 and State v Peiffer, 212 Neb 864, 326 NW 2d 844, 845 (1982). Thus, the rational of the 8th Circuit should be applied in the present case to allow the petitioner a jury trial. A ten-year license revocation is "out of step" with the 6-month prison term.

The ten year license revocation is further aggravated because the petitioner may never get his license back. N.J.S.A. 39:5-30 and 5-30(d) and 39:5-31. Moreover, the loss of license affects the petitioners ability to operate a vehicle for ten years in many States across the country. N.J.S.A. 39:50-1 et. seq. There is not a legislator who exists who could not admit that this is serious and shows the intent of the legislature to penalize.

In Blanton the defendant faced a possible fine of $1000.00, which this Court compared to the $5,000.00 federal level. In the present case the petitioner faced a mandatory $1,000 fine. The petitioner also faced State action which results in an additional $100.00 enforcement surcharge, a $3,000.00 insurance surcharge, as well as other calculable charges. The total financial exposure the petitioner faced was close to $5,000.00 if not exceeding

same.

The New Jersey Supreme Court simply concludes the fees are either reasonable or are not related to an intent of the legislature to "pack" the penalties. However, the petitioner disagrees. These are not simply collateral penalties. The penalties result from direct State action designed to force financial hardship on persons who violate N.J.S.A. 39:4-50.[1] Thus, the penalties also serve as a penal consequence for violators of N.J.S.A. 39:4-50.

Thus, the total monetary penalties that the petitioner faced manifest the legislature's intent that this is a serious offense when compared with the federal monetary guideline for a jury trial.

Finally, the petitioner requests that this Court also consider N.J.S.A. 2C:52-1 and 2C:52-4 which allows convicted "criminals" and disorderly persons to expunge their records after a period of time. A violator of N.J.S.A. 39:4-50 gets no similar right for good behavior. This also provides a clue to the legislative determination of the seriousness which surrounds a conviction for DWI.

In conclusion the petitioner asserts that for the State with the "toughest [DWI penalties] in the nation" to be one of four states to not allow jury trials is absurd. See PA7. The above, briefly outlined argument provides an outline for this Court to conclude that the New Jersey State legislature has attempted to place monetary concerns over constitutional concerns. A conclusion can be drawn that the New Jersey legislature has sought to defeat the Sixth Amendment of the Constitution by keeping the prison sentence to no more than six months, while finding other severe penalties to punish what the legislature considers to be a serious offense.

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1. Presumably the theory supporting these surcharges is that there are a high percentage of "alcohol related" accidents. Thus, why not force those who drink and drive to subsidize the rest of the population's insurance premiums.

B.

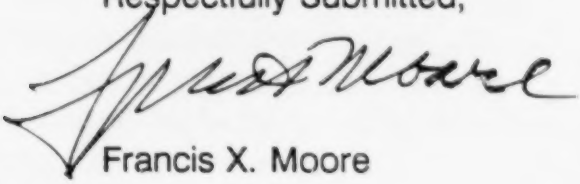
DOES THE PETITIONER, A THIRD-OFFENDER, FACE INCARCERATION WHICH PRESUMPTIVELY GUARANTEES HIM A JURY TRIAL?

Yes, the petitioner faces more than six months of incarceration for a third offense violation of N.J.S.A. 39:4-50. As stated above the third offender faces "not less then 180 days" of incareceration. Additionally, the third offender must satisfy the requirements of the Intoxicated Drivers Resource Center. Those requirements for a third are 12 hours of treatment. Two 6 hour days. 22 NJR 859; 8:66-6.10-6.12. The penalty for failure to comply with the 12 hours is a mandatory two days incarceration. N.J.S.A. 39:4-50(b). See also 22 NJR 855; 8:66-A-3.3(d).

Therefore, the petitioner when he stood before the trial court faced a minimum of 182 days in jail.

Thus, the petitioner is presumptively guaranteed a jury trial. Duncan v Louisiana, 391 US 145, 88 S Ct 1444, 20 L Ed 2d 491 (1968).

Respectfully Submitted,



Francis X. Moore

Michael R. Speck and
Francis X. Moore on
the brief.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

—

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DONALD HAMM; Petitioner,

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PETITIONERS APPENDIX

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STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

DONALD HAMM,

Defendant-Appellant.

Argued February 27, 1990 -- Decided August 6, 1990

On certification to the Superior Court,
Appellate Division

Michael R. Speck argued the cause for appellant (Francis X. Moore, attorney; Mr. Speck and Mr. Moore, on the briefs).

Mark P. Stalford, Assistant Prosecutor, argued the cause for respondent (John Kaye, Monmouth County Prosecutor, attorney).

Linda K. Danielson, Deputy Attorney General, argued the cause for amicus curiae Attorney General of New Jersey (Robert J. Del Tufo, Attorney General, attorney).

Brian J. Neary argued the cause on behalf of amicus curiae Association of Criminal Defense Lawyers of New Jersey.

The opinion of the Court was delivered by O'HERN, J.

The question in this case is whether a defendant, after having been twice convicted of driving while intoxicated

(DWI) in violation of N.J.S.A. 39:4-50(a), has a constitutional right to trial by jury for a third DWI offense. We hold that the statutory penalties for DWI are not so severe as to clearly reflect a legislative determination of a constitutionally "serious" offense requiring jury trial.

I

Defendant was arrested for his third DWI offense on August 10, 1986. Prior to trial defendant moved for a trial by jury. The municipal court judge denied that motion, relying on State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984), certif. denied, 99 N.J. 236 (1985), in which the court had ruled that a three-time DWI offender was not entitled to a jury trial, and accepted defendant's plea of guilty conditioned on the preservation of the pretrial motion for a jury trial. The court sentenced defendant, in accordance with N.J.S.A. 39:4-50(a)(3), to ninety days of community service, twenty-eight days in an inpatient program and sixty days in an outpatient program. The court fined defendant $1,000; imposed a surcharge of $100, N.J.S.A. 39:4-50.8 and $15.00 court costs; and suspended his license for ten years.

On defendant's appeal, the Law Division affirmed the trial court's denial of his motion for a jury trial, and the Appellate Division affirmed that judgment.We granted defendant's petition for certification. 117 N.J. 51 (1989).

II

A.

We begin by noting that the question is posed primarily as one of federal-constitutional right. That is because New Jersey has never recognized a right to trial by jury for the motor-vehicle offense of DWI. It is simply not a crime

under New Jersey law.

> Persons charged with crime are constitutionally entitled to trial by jury. Those charged with petty offenses are not. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968). The New Jersey Supreme Court has held that the only reliable test for distinction is the severity of the authorized punishment, and that jury trial is not required unless the maximum penalty to which the defendant is exposed exceeds six months incarceration and a fine of $1,000. State v. Owens, 54 N.J. 153 (1969); In re Yengo, 84 N.J. 111 (1980). See Baldwin v. New York, 99 U.S. 66, 90 S.Ct. 1886, 26 L.Ed. 2d 437 (1970). Where actually related petty offenses are tried together whose maximum sentences total more than six months, and the defendant is not offered a jury trial, the sentences may not total more than six months. State v. Owens, supra.Concurrent jail sentences, each of which does not exceed six months, are permissible. Id. 54 N.J. at 163.
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> [State v. Linnehan, supra, 197 N.J. Super. at 43]

B.

Our federal analysis centers on the United States Supreme Court's decision in Blanton v. North Las Vegas, 489 U.S. _____, 103 L.Ed. 2d 550 (1989). In that case the Court held that first-time offenders of the Nevada drunk-driving laws were not entitled to trial by jury. A first-time DWI offender in Nevada may face between two days and six months of incarceration or, in the alternative, forty-eight hours of community work while identifiably dressed as a DWI offender. In addition, the defendant must pay a fine ranging from $200 to $1,000, enter an alcohol abuse

education program at defendant's own expense, and automatically forfeit his or her license for ninety days.

In Blanton, the Court traced the long development of the doctrine of the constitutional right to trial by jury, and summarized its general view that if the maximum sentence of incarceration for an offense is six months or less, society views that offense is six months or less, society views that offense as "petty" and there is presumptively no right to trial by jury.

489 U.S. at _____, 103 L.Ed. 2d at 556. See generally Note, "Drunk Drivers Have No Right to Jury Trial," 20 Seton Hall L. Rev. 600 (1990) (analyzing Blanton). That doctrine is based on a long history of non-jury trials of what were regarded as petty offenses in colonial courts. "[T]he common law, despite its veneration for the jury, always recognized a wide range of petty offenses which were

tried summarily before a magistrate without the interposition of a jury." H. Kalven, Jr. & H. Zeisel, The American Jury 15 (1966). [1]

But the Court in Blanton considered as well the penalties other than incarceration imposed under Nevada DWI law, and concluded that taken in the aggregate the various fines, period of license suspension, and community service requirements did not make a first-time DWI conviction in Nevada a "serious" offense for sixth-amendment purposes. 489 U.S. at _____, 103 L.Ed. 2d at 558. With regard to the possible $1,000 fine faced by a first-time DWI offender in Nevada, the Court indicated

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1. This history was summarized by (later Justice) Felix Frankfurther and Thomas Corcoran in a 1926 law review article: Both in England and in the colonies a clear and unbroken practice -- despite all uncertainties and reservations -- emerges for two centuries preceeding the Constitution. Many offenses were customarily tried solely by magistrates.These offenses were compendiously characterized as "petty". But pettiness was not a rigidly fixed conception; demarcation between resort to jury trial and its dispensation was not mechanical. In subjecting certain conduct to the summary procedure of magistrates, unguarded by the popular element, there was an execise of moral judgment dividing behavior into serious affairs and minor misdeeds. The gravity of danger to the community from the misconduct largely guided the moral judgment; the wide repetition of the act, raising practical problems of enforcement, in part influenced the moral value which the community attached to the act. The apportioned punishment was both a consequence of the minor quality of the misconduct and an index of the community's moral judgment upon it. Broadly speaking, acts were dealt with summarily which which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light. These general tendencies, both in England and in the colonies, represent the history absorbed by the Constitution. [Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", 39 Harv. L. Rev. 917, 980-81 (1926).]

that that amount was "well below" the $5,000 level set by Congress in its most recent definition of a 'petty' offense, 18 U.S.C. Section 1 * * * ." Id. at _____, 103 L.Ed. 2d at 557.

The Court in Blanton recognized that there may be some offenses to which a legislature attaches such onerous penalties that sixth-amendment concerns may be implicated. Hence, the Court stated that although an offense with a maximum six month sentence would presumptively not warrant a jury trial, yet in a "rare situation" if a "legislature packs an offense" by imposing other penalties in such a manner that it becomes "serious" without "punctur[ing] the 6 month incarceration line," a jury trial would be necessary. Id. at _____, 103 L.Ed. 2d at 556-57. In the wake of Blanton the Court has given no indication of what criteria it may invoke in the future to give content to the expression "serious". Nonetheless, these principles, which have remained unmodified, provide the analytical framework for resolving this case.[2] The question we must decide is whether the Legislature has so "packed" the offense of DWI that it must be regarded as "serious" for sixth-amendment purposes.

2. Along the way, the Supreme Court seems to have shed some outmoded doctrinal analysis of jury-trial rights. For example, in District of Columbia v. Colts, 282 U.S. 63, 75 L.Ed. 177 (1930), it viewed reckless driving of an automobile as malum in se (evil in itself), thus requiring trial by jury. Would anyone today seriously believe that a reckless driving charge demanded a jury of twelve? And on the score of social opprobrium or stigma (once a basis for jury trial because indicative of moral turpitude, see Callan v. Wilson, 127 U.S. 540, 556, 32 L.Ed. 223, 228 (1888) (conspiracy requires jury trial because "offense of a grave character"), it seems that some people, unless they have themselves suffered the senseless violence that a drunk driver can inflict, maintain a moral ambiguity about the offense, at least when no injury or accident has occurred. Indeed, there are organizations that champion what they believe is the unfair treatment of drinking drivers. No, the constitutional answer will not be found under the labels of opprobrium or stigma.

III

A.

New Jersey's history and traditions with respect to DWI offenses convince us that however deliberately our Legislature has addressed the problem, it has yet to take that step that would transform a DWI offense into a constitutionally "serious" offense. This is not to say that our DWI laws are not tough. Indeed, Governor Kean described them as the "toughest in the nation". Kelly v. Gwinnell, 96 N.J. 538, 545 (1984) (citing Governor's Annual Message to the New Jersey Legislature, Jan. 10, 1984). But he was obviously not referring to the criminal punishment that we inflict. Many states impose longer sentences of imprisonment than we. Many impose a one-year maximum, several a two-year maximum, for a first offense. See Note, "The Federal Constitutional Right to Trial by Jury for the Offense of Driving While Intoxicated", 73 Minn. L.Rev. 122 (1988) [hereinafter Note, "Jury for DWI"] (Appendix surveying state statutory penalties for first-time DWI violations). Some impose much longer sentences for repeat offenses. In Louisiana, for example, a fourth offender is subject to a mandatory ten years at hard labor, with a maximum thirty-year term of imprisonment. La. Rev. Stat. Ann. S.14:98. What Governor Kean undoubtedly had in mind was the ever-tightening grid of regulations that accompanied federal highway-safety requirements and rising public awareness of the social costs of drunk driving.Statistics indicate that nationally approximately 6,700 lives were saved in 1987 alone as a result of heightened efforts to rid the highway of drunk drivers.National Highway Traffic Safety Administration: Alcohol-Related Traffic Fatalities, 1982-1987.

Our judicial doctrines have reinforced these legislative changes at each step in the DWI-litigation process: the validation of the breathalyzer as the critical scientific test of blood alcohol (BAT) in establishing the offense, Romano v. Kimmelman, 96 N.J. 66 (1984); the rejection of individualized evidence that would undermine the BAT in trying such cases, State v. Tischio, 107 N.J. 504 (1987), appeal dismissed, 484 U.S. 1038, 98 L.Ed. 2d 855 (1988), and State v. Downie, 117 N.J. 450 (1990); and the elimination of a mental-state requirement for the offense, State v. Hammond, 118 N.J. 306 (1990). In each of those cases we have recognized the social significance of DWI. We found that "[t]he primary purpose behind New Jersey's drunk-driving statutes is to curb the senseless havoc and destruction caused by intoxicated drivers * * * * [and] to eliminate intoxicated drivers from the roadways of this State". State v. Tischio, supra, 107 N.J. at 512 and 514.

Despite the fact that the Legislature regards DWI as a profound social problem, it has yet to impose the full force of law on that offense that would denote a social evaluation that DWI is a "crime" or an offense that equates with the need of trial by jury. The Legislature has yet to require a sentence in excess of six months, or even to require a mandatory six months of incarceration. It continues to address the problem with a measured response tempered by strong doses of rehabilitation and reparation.

In State v. Laurick, 231 N.J. Super, 464 (1990) (slip op. at 2-3), we gave a brief but non-definitive summary of DWI penalties. All offenders must satisfy various educational and rehabilitative requirements and must pay enforcement and insurance surcharges. The escalating penalties that are the primary concern of this appear are the fines, license suspensions, community service, and custodial terms imposed by N.J.S.A. 39:4-50, in brief:

	First Offense	Second Offense	Third Offense
Fine	$250 to $400	$500 to $1,000	$1,000
License Suspecsion	six months to one year	two years	ten years
Community Service		thirty days	up to ninety days, resulting in reduction of imprisonment for equal number of days
Detainment or Incarceration*	up to thirty days; twelve to forty-eight hours at Intoxicated Driver Resource Center	forty eight hours to ninety days	180 days

*Offenders may be sentenced to county jail or workhouse, inpatient rehabilitation program, or other facility approved by Director of Division of Alcoholism, Department of Health. First and second offenders may be sentenced to an Intoxicated Driver Resource Center.

Aside from the $1,000 fine (which the Blanton court would regard as "petty" for constitutional purposes) and the 180 day imprisonment, third-offense DWI penalties are civil penalties. Evidence that the Legislature views such penalties as qualitatively different from criminal penalties is their exemption from general statutory restrictions. The Criminal Code expressly distinguishes civil penalties, including suspension or cancellation of a license, allowing their imposition regardless of statutory limitations on criminal penalties that otherwise apply to non-criminal

offenses such as motor-vehicle offenses. N.J.S.A. 2C:43-2d. Of course we do not disregard these civil penalties. We note only that they are not the penalties associated with crimes.

In contrast, when the New Jersey Legislature wants to treat an offense as "serious", there will be no mistaking it. When the Legislature became concerned with the prevalence of guns in our society, it directed that many routine offenses would carry a mandatory three-year term of imprisonment if committed with a firearm. N.J.S.A. 2C:43-6c. And recently, in its Comprehensive Drug Reform Act, the Legislature provided mandatory prison sentences for the selling of drugs within one thousand feet of a school N.J.S.A. 2C:35-7.

In addition, we have uniformly recognized that the DWI offense is in no sense to be regarded as a criminal offense under the laws of the State of New Jersey. In re Buehrer, 50 N.J. 501, 517-18 (1967), we offered the following brief outline of what offenses do not qualify as "crimes":

> In our State "crimes" * * * are within our constitutional guarantees of indictment and trial by jury.
>
> Below the grade of crime are lesser offenses, none of which carries the stigma of the disabilities which follow upon a conviction of crime, * * * or authorized maximum penalties as severe as those which may be imposed upon a conviction for crime. Among the lesser offenses are "disorderly person" offenses which cover a wide gamut of misbehavior * * *. In addition, there are other statutes providing for lesser offenses with still lower limits on punishment, such as the Motor Vehicle Act, and of course there are municipal ordinances as well.
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> [Citations Omitted.]

We recently reaffirmed in State v. Hammond, supra,

118 N.J. 306, that DWI is not a "criminal offense" as defined in New Jersey's Code of Criminal Justice. Hence, the culpability standards with respect to state of mind that ordinarily attend criminal offenses do not attend DWI offenses. Also instructive is our recent ruling that when the motor-vehicle offenses of careless driving and reckless driving are lesser-included offenses of the crime of death by auto, their determination is the province of the judge rather than the jury. State v. Muniz, 118 N.J. 319 (1990).

B.

When it comes to evaluating whether DWI is constitutionally "serious" or "petty", "a page of history is worth a volume of logic". Frankfurter and Corcoran, "Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury", 39 Harv. L.Rev. 917, 922 (1926) (quoting Justice Holmes in New York Trust Co. v. Eisner, 256 U.S. 345, 349, 65 L.Ed. 963, 983 (1921). This debate about trial by jury for DWI cases is far from new in New Jersey. Our Legislature has, for over fifty years, deliberately chosen a course of action intended to balance its concerns for the eradication of DWI with the practical realities of enforcing its regulatory provisions over the approximately five million drivers licensed by the State. The history of N.J.S.A. 39:4-50 may be traced to the first New Jersey drunk-driving statute, enacted over eighty years ago. L. 1909, c. 127. That act, supplementing the Crimes Act, provided that a number of motor vehicle violations, including driving "while in an intoxicated condition", constituted misdemeanors. Four years later, however, in an act supplementing the Disorderly Persons Act, the Legislature provided that anyone operating a motor vehicle on a public street or highway "while under the influence of intoxicating liquors" should be adjudged a disorderly person, and punished by imprisonment of not less than

thirty days nor more than six months. L. 1913, c. 67.

The problem of contrasting characterizations of drunk driving in the 1909 and 1913 statutes was resolved by the then-high court in State v. Rodgers, 91 N.J.L. 212 (E. & A. 1917). There the defendant, having been convicted in the Paterson recorder's court of a disorderly persons offense and sentenced to thirty days' incarceration based on DWI, argued that the 1913 statute was invalid because it provided for conviction of DWI, a misdemeanor under the 1909 statute, without indictment and trial by jury. Defendant also argued that because the offense constituted a public nuisance indictable at common law, the recorder lacked jurisdiction. The Court said that although DWI may, in fact, make the driver guilty of a public nuisance, no such evidence was required to sustain the charge. When the charge was not of a common-law offense, the Court asserted, the admission of evidence that would allow conviction of a common-law offense would not alter the character of the offense as disorderly conduct, and thus, would not deprive the recorder of jurisdiction. 91 N.J.L. at 217.

Four years later the Legislature downgraded DWI to a motor-vehicle offense, reaffirming and expanding the penalties in the 1913 law. L. 1921, c. 208, S.14(3), p. 665. The new motor-vehicle law provided for the same term of imprisonment plus forfeiture of driver's license for one year for a first offense, and five years for a subsequent offense. Previous acts relative to motor vehicles were expressly repealed at the same time. L. 1921, c. 184. In 1925 a driver, again, challenged his DWI conviction by an Ocean County justice of the peace under the 1921 statute, claiming that the statute was contrary to the New Jersey Constitution because it provided for imprisonment without jury trial. Klinges v. Court of Common Pleas, 4 N.J. Misc. 7 (Sup. Ct. 1925). The court, again, rejected the claim, referring to Katz v. Eldredge, 97 N.J.L. 123 (E. &

A. 1922) (discussing constitutional requirement of jury trials for prohibition-era penalties with up to six-month imprisonment), clarified, 98 N.J.L. 125 (E. & A. 1922) (vote on jury issue short of majority of Court). In Katz v. Eldredge, Justice White, explaining the standard for invoking the right to jury trial, expressed what legal scholars Felix Frankfurter and Thomas Corcoran have called "a principle of persisting vitality":

> [A]ssuming that the punishment will bear proper relation to the seriousness of the offense, the theory, as I understand it, which gave rise to the distinction at common law and in subsequent statutes, is that the convenience and benefit to the public resulting from a prompt and inexpensive trial and punishment of violations of petty and trivial police power regulations are more important than the comparatively small prejudice to the individual resulting from his being deprived of the safeguard of indictment before having to answer and of trial by a jury when held to answer.
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> [97 N.J.L. at 151, quoted in Frankfurter and Corcoran, supra, at 953.][3]

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3. See also Latimer v. Wilson, 103 N.J.L. 159 (E. & A. 1926) (holding that DWI law did not unconstitutionally deprive defendant of right to trial by jury because right depends not on punishment imposed, but on character of statute and nature of offense, and DWI was non-indictable statutory offense); Caruso v. Porter, 102 N.J.L. 71 (Sup.Ct.1925) (finding no constitutional violation in 1921 DWI law because statutory offense may properly be subject to summary trial and punishment; State v. Shaw, 1 N.J. Misc. 82 (Sup.Ct. 1923)(relying on State v. Rodgers, 91 N.J.L. 212 (E. & A. 1917), when upholding constitutionality of non-jury trial for motor-vehicle offense of DWI).

A 1926 amendment to the DWI statute altered the penalties by providing for a fine of not less than $200.00 nor more than $500.00 or imprisonment for not less than thirty days nor more than three months, or both, in the discretion of the magistrate, and a two-year loss of license. A second offense carried a mandatory penalty of three months imprisonment and forfeiture of license to drive "thereafter". L. 1926, c. 152. Hence, between 1926 and 1952 second offenders faced mandatory three-month imprisonment and forfeited their licenses permanently. In short, at no time since 1913, spanning the time when our 1947 Constitution was adopted, did our history or traditions ever evidence a legislative determination to treat DWI offenses as indictable offenses.

The ten-year suspension was introduced in 1952. L. 1952, c . 286. Allowing license restoration for repeat DWI offenders reflected a downgrading of earlier social attitudes about DWI. Those pragmatic legislative judgments about how best to deal with DWI then turned to rehabilitation as a social goal. The 1977 amendments, while mandating rehabilitation programs, differentiated penalties for second and third offenders, offered discretionary alternatives to imprisonment even for third offenders, and lowered the maximum license suspension to five years. L. 1977, c. 29, S.1.

The 1981 amendments, reflecting another shift in legislative attitudes, mandated community service and reinstated the ten-year suspension and mandatory imprisonment for third offenses. L. 1981, c. 537, S.1. Significant portions of that sentence may be noncustodial, however, because of the alternatives to incarceration available under N.J.S.A. 39:4-50(a)(3), and the availability of a work-release program and release from an inpatient to an outpatient program under N.J.S.A. 39:4-51. More recent legislation has established Intoxicated Driver Resource Centers, and has required every offender to

complete an education program at a Center, reflecting increased emphasis on rehabilitation, education, and prevention. L. 1983, c. 444, S.1. During the same period several courts rejected demands for jury trials by DWI defendants. See, e.g., State v. Linnehan, supra, 197 N.J. Super. 41; State v. Zoppi, 196 N.J. Super. 596 (Law Div. 1984); State v. Ferretti, 189 N.J. Super. 578 (Law Div. 1983).

IV

A.

Although it is clear from this history that the punishment for a third DWI offense does not in any sense equate with the punishment for a crime, its "seriousness" must be analyzed today in light of the Blanton decision. Our sense of judicial fairness is not frozen in the past. Were it so, we might still see prisoners in stocks or public floggings for minor offenses that did not provide for a jury trial. See Frankfurter and Corcoran, supra, at 950-51 (citing Allinson Laws of New Jersey, 403, 418 (1775), and the Disorderly Persons Act of 1799). No, the answer is not to look only to the past but to look as well to contemporary human values. As Justice Brennan recently stated, "All rules * * *, even ancient ones, must satisfy contemporary notions of due process". Burnham v. Superior Court of California, 58 U.S.L.W. 4629, 4636 (1990) (plurality opinion).

In this light, we must then examine the various penalties imposed for a third DWI offense, on top of the potential six month incarceration period and fines, in order to determine whether the offense is "serious" under Blanton.

B.

When compared with the Nevada drunk-driving statute analyzed in Blanton, the most significant difference within our DWI law is the ten-year license-revocation period for a third offense. It is qualitatively distinct from all other escalating penalties in its jump from two to ten years for third offenders. At first glance it would appear not to be a penalty. After all, it is really a licensing function that could be administered quite apart from the municipal court system. For now, we will treat it as part of the DWI "penalties", albeit civil. As noted previously, the United States Supreme Court dismissed Nevada's ninety-day license suspension for a first offense as insignificant for sixth amendment purposes; however, it qualified its statement by indicating that it was particularly insignificant due to the fact that a restricted license could be obtained after forty-five days. Blanton, supra, 489 _____n.9, 103 L.Ed. 2d at 557 n.9. Thus it appears that the Court did not dismiss the idea of a license revocation as being "non-punitive"; rather, this particular period was viewed as insignificant due to its brevity.

Nor will we seek to trivialize the license revocation by an outworn distinction between rights and privileges. Anyone who thinks it is a governmental privilege to drive a car in New Jersey has only to experience the life of a suburban homemaker providing transportation for almost all of life's necessities, or the life of a salesperson trying to call on customers in far-flung shopping or industrial malls. A license to drive is not a privilege, it is nearly a necessity. And its deprivation is clearly a "consequence of magnitude".See Rodriguez v. Rosenblatt, 58 N.J. 281, 295 (1971).

But is there any evidence that this license suspension is the constitutionally "serious" penalty that requires a trial by jury? There are many valued licenses held by our

citizens that will never enjoy a comparable guarantee of jury trial. A tavern owner may forever lose a license to see wines and liquors at a place of business without more than an administrative hearing. A doctor, dentist, broker or lawyer may, without a jury trial, similarly lose more valued privileges than driving. A casino operator might lose a multi-million dollar license to operate without a jury trial. Even the loss of such a valued license, much less the suspension of a license, invokes only the process required to assure a fair hearing. Would it not be anomalous that a temporary loss of a license to drive be given greater constitutional protection? After all, has not the third-time DWI offender proven no once, not twice, but three times, that he or she presently lacks the qualifications to drive safely in New Jersey?

And as noted, the ten year license suspension that was reinstated in 1981 does not in any sense reflect a significant escalation of the seriousness with which New Jersey's Legislature regards this offense, but rather a shifting social conclusion about what works best with DWI offenders. For long periods in our history this penalty was in existence. For other periods in our history, revocation for a repeat offender was final. As nearly as we can determine, there was no reprieve, administrative or otherwise, from this total revocation. Hence, we cannot say that today's Legislature has "packed" this offense with onerous penalties that just avoid "punctur[ing] the six month incarceration line". Blanton, supra, 489 U.S. at _____, 103 L.Ed. 2d at 556-57.

The other civil penalties or administrative sanctions would not appear to offend the Blanton criteria.The various rehabilitation and enforcement surcharges are reasonable in themselves. See State v. Zoppi, supra, 196 N.J. Super. 596. "As for increased insurance premiums, these can as easily result from a couple of speeding tickets, or from a fender-bender or two never criminally

prosecuted." Landry v. Hoepfner, 840 F.2d 1201, 1216 (5th Cir. 1988) (en banc), cert. denied, _____ U.S. _____, 103 L.Ed. 2d 844 (1989). The DWI surcharge was totally unrelated to any legislative intent to "pack" the DWI offense and came in as part of the New Jersey Automobile Insurance Reform Act of 1982, which created the Joint Underwriting association (JUA). See L. 1983, c. 65; N.J.S.A. 17:29A-35b(2). It is not "punitive" for purposes of ex post facto analysis. Clark v. New Jersey Div. of Motor Vehicles, 211 N.J. Super. 708, 711 (App. Div. 1986).

Finally, the limited collateral consequences of DWI reinforce the conclusion that it remains a constitutionally "petty" offense. See Baldwin v. New York, 399 U.S. 66, 69, 26 L.Ed. 2d 437, 440-41 (1970). Under New Jersey law, for example, a public official convicted of a crime of dishonesty, no matter how petty, will suffer a forfeiture of public employment, N.J.S.A. 2C:51-2a(1), and in some cases a loss of pension benefits. A petty offense such as the illegal possession of drugs, if it occurs during the course of employment, could equally cause such a forfeiture. In neither case would there be a jury trial. Cf. Moore v. Youth Correctional Inst., 119 N.J. 256 (1990) (discussing standards for forfeiture of employment). No such severe consequences attend a conviction of DWI. Granted, it is a bitter pill to be without access to an automobile for ten years, but it is equally true that that provision serves as well in the interest of public safety as in the interest of stigmatizing or punishing the defendant. See In re Kallen, 92 N.J. 14, 29 (1983) (purpose of Implied Consent Law providing for license suspension on refusal to take chemical breath test "is not to punish the driver but to protect the motoring public by removing the offending driver from the highways with reasonable dispatch"). One could never deny that the social stigma of shoplifting, for example, would be vastly greater, but we do not afford jury trials for that disorderly persons offense.

Our prevailing societal attitudes hold that proper responses to alcohol abuse are rehabilitative, not punitive. See N.J.S.A. 26:2B-21 (no right or privilege may be denied because of status as alcoholic or treatment for alcoholism); Clowes v. Terminix Int'l., Inc., 109 N.J. 575, 594 (1988) (alcoholism treated as disability rather than evidence of misconduct). In fact, the useful parallel legislative view of alcohol rehabilitation is that DWI convictions are erased after a period of good behavior.See N.J.S.A. 39:4-50(a)(3) (after ten year lapse, second offense treated as first and third offense treated as second for sentencing purposes.) In other words, there is an assumption that time will in some ways cure the problem of alcohol abuse. We have no way of judging how correct those legislative assumptions are. They seem to be reasonably based on human experience and we would not say that a legislature should not be free to make such a judgment.

The heart of the Blanton decision appears to require a value judgment on whether or not a state legislature had made its DWI offense and penalties so onerous that the principles of the sixth amendment should require trial by jury as a constitutionally "serious" offense. That requires in turn some consideration of how the Legislature itself views the offense. We may presume that the Legislature is fully aware that a statutory maximum penalty greater than 180 days' imprisonment would invoke the right to trial by jury, and that its historic confinement to that limit in DWI statutes is intentional. In fact, the very language of the statute that calls for "at least 180 days" of confinement has been interpreted to mean "not more than 180 days" precisely to reflect what our courts have considered to be the undoubted legislative intention to continue to treat DWI as a motor-vehicle offense, not a crime. State v. Linnehan, supra, 197 N.J. Super. at 43 (citing State v. Owens, 54 N.J. 153 (1969), cert. denied, 396 U.S. 1021, 24 L.Ed. 2d 514 (1970).

C.

Finally, the provision of jury trial on a DWI charge by the majority of other states does not suggest the same result in New Jersey. State v. Nemesh, 228 N.J. Super. 597, 607 (App. Div. 1988) (citing Annotation, "Right to Trial by Jury in Criminal Prosecution for Driving While Intoxicated or Other Similar Offenses", 16 A.L.R. 3d 1373 (1967). The Fifth Circuit recently rejected the claim that under Louisiana law DWI is a "serious" offense requiring trial by jury. Landry v. Hoepfner, supra, 840 F. 2d 1201. That court pointed out that because most states do not follow the "petty offense" doctrine, in those states entitlement to jury trial does not establish an offense as serious; in many states all offenses, or all traffic offenses, or all offenses subject to any custodial sentence entail jury trial. Id. at 1218. That court concluded that notwithstanding the award of jury trials for DWI in the majority of states, that same majority "classifies DWI in a manner which meets the standards of the [United States] Supreme Court's definition of 'petty'". Id. at 1219.

Nor do we adhere to our "petty offense" classification out of a wish to avoid the administrative burden of additional jury trials. As noted, the great majority of jurisdictions provide jury trials for DWI offenders, see Id. at 1217-19, presumably coping with the consequent demands on their court systems. In the case of third DWI offenders, preliminary statistics from the Division of Alcoholism in the Department of Health indicate that yearly there would be approximately 2,000 potential jury trials. It would be a burden, but it could well be less than projected. In many cases breathalyzer measurements will encourage pleas or waivers. See Note, "Jury for DWI" at 152 (administrative problems not significant because throughout the country most DWI defendants plead guilty

or waive right to jury trial). We recognize that DWI trials require care. They are not, or never should be, rushed. We were informed at oral argument that judges have special calendars for handling them. See State v. Gallegan, 117 N.J. 345 (1989). Expediency is not our guide.

V

In sum, we believe that although the Legislature may regard DWI as a profound social problem based on its potential threat to public safety, the statutory penalties do not signal the Legislature's intent to treat DWI as the functional equivalent of a crime.Attainment of the "six month incarceration line", Blanton, supra, 489 U.S. at _____, 103 L.Ed. 2d at 557, is not the automatic product of a third DWI offense under New Jersey's law. The law allows for various alternatives to incarceration, with a strong emphasis on community service and rehabilitative alternatives. It is not without significance that the statistical data that we have on repeat DWI offenders come from the state Department of Health, which operates the Intoxicated Driver Program Unit within its Division of Alcoholism. See N.J.A.C. 8:66A-1.1 to 9.5. The ten year license suspension for third offenders, although in itself a heavy burden, is both precautionary and penal. No other loss of privilege, franchise, or right of citizenship flows from a DWI conviction.

The legislative and judicial history of DWI in New Jersey shows both its consistent treatment as a non-criminal offense and progressive legislative emphasis on rehabilitation and prevention rather than punishment alone. We have described this legislative response as one to a "societal dilemma", State v. Tischio, supra, 107 N.J. at 514, as to a sickness rather than a sin.Absent, then, clear constitutional requirement, reclassification of DWI

as an offense to which trial by jury may attach should properly be by legislative, rather than judicial, judgment. The Blanton Court cautioned that "[t]he judiciary should not substitute its judgment as to seriousness for that of a legislature * * * ". 489 U.S. at _____, 103 L.Ed. 2d at 555.

A longer retrospective view reveals that those who shaped our institutions and secured for us the constitutional guarantee of trial by jury always realized that drawing the line between "petty" and "serious" offenses left a "margin for legislative discretion". Frankfurter and Corcoran, supra, at 979. In demarcating the offenses requiring jury trial,

> we reach the everlasting enigma in law and in life: When is far too far But we need not be "troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law . . .".
>
> [Id. at 981 (quoting Justice Holmes in Irvin v. Gavit, 268 U.S. 161, 168, 69 L.Ed. 2d 897, 899 (1925)).]

In this business of drawing lines, we claim no monopoly on constitutional wisdom. Other courts have concluded that DWI is a serious offense requiring jury trial. See, e.g., Richter v. Fairbanks, 903 F. 2d 1202 (8th Cir. 1990) (jury trial required under Blanton when maximum imprisonment six months but $500 fine and fifteen-year driver's license revocation also mandated); United States v. Craner, 652 F. 2d 23 (9th Cir. 1981) (jury trial required when defendant faced possible six month imprisonment and $500 fine under federal law, and six month license revocation under state law); State v. O'Brien, 68 Haw. 38, 704 P. 2d 883 (1985) (jury trial required despite six-month limit on imprisonment because mix of punishments signaled seriousness.) It may be that the Supreme Court will

draw a bright line to guide states in DWI cases. Blanton now appears to embrace a spectrum of values, a continuum rather than a clear contrast: the closer the DWI system actually comes to the six-month incarceration line, the less room there may be for other penalties. For now, given the rehabilitative emphasis in New Jersey's DWI laws (Hamm will serve no county-jail time; his sentence is split between community service and rehabilitation), we find the Blanton criteria not to be violated. It is not an easy question, but then neither is the underlying problem of how to handle DWI cases. That problem has been with us since the dawn of the automobile age. It will end when that age ends.

The judgment of the Appellate Division is affirmed.

Chief Justice Wilentz and Justices Handler, Pollock, Garibaldi, and Stein join in this opinion. Justice Clifford did not participate.

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-3707-87T7

STATE OF NEW JERSEY

Plaintiff-Respondent,

v.

DONALD HAMM

Defendant-Appellant.

Submitted January 10, 1989 -- Decided January 20, 1989
Before Judges Michels, Long and Keefe.
On appeal from the Superior Court of New Jersey, Law Division, Monmouth County.

Francis X. Moore, attorney for appellant (Michael R. Speck, of counsel and on the letter brief).

John Kaye, Monmouth County Prosecutor, attorney for respondent (Mark P. Stalford, Assistant Prosecutor, of counsel and on the letter brief).
PER CURIAM.

Defendant Donald Hamm was charged with, among other offenses, operating a motor vehicle under the influence of intoxicating liquor, in violation of N.J.S.A. 39:4-50. Defendant's motion for a jury trial was denied by the Marlboro Municipal Court. Thereafter, defendant, pur-

suant to R. 3:9-3(f), entered a conditional plea of guilty to operating his motor vehicle while under the influence of intoxicating liquor. The municipal court sentenced defendant, who was a third offender, to (1) a $1,000 fine, (2) a $100 surcharge, (3) a 10-year driver's license revocation, (4) 90 days of community service, (5) 28 days in an in-patient rehabilitation program and (6) 60 days in an out-patient program.

Defendant appealed to the Law Division, where the trial court upheld the municipal court's denial of defendant's motion for a trial by jury. On the basis of defendant's guilty plea, the trial court imposed the same sentence as that imposed by the municipal court. Defendant appealed.

Defendant seeks a reversal of his conviction and remand for a jury trial on the following grounds set forth in his letter brief:

I. SINCE THE THIRD OFFENSE VIOLATING N.J.S.A. 39:4-50 IS A "SERIOUS" OFFENSE, THE TRIAL COURT VIOLATED THE FEDERAL CONSTITUTIONAL RIGHT TO A TRIAL BY JURY BECAUSE THE SIXTH AMENDMENT GUARANTEES THAT ALL DEFENDANTS CHARGED WITH A "SERIOUS" OFFENSE ARE ENTITLED TO A TRIAL BY JURY.

A. N.J.S.A. 39:4-50 IS BY ITS NATURE A MALUM IN SE OFFENSE.

B. DRIVING WHILE INTOXICATED WAS AN INDICTABLE OFFENSE AT COMMON LAW.

C. THE PENALTIES ARE SO SEVERE THAT A TRIAL BY JURY MUST BE GRANTED.

We have carefully considered these contentions and all of the arguments advanced by defendant in support of them and find that they are clearly without merit. 2:11-3(e)(2). We, therefore, affirm the denial of defendant's motion for a jury trial substantially for the reasons expressed by Judge Stamelman in his oral opinion of February 11, 1988.

The trial court's decision is consistent with and controlled by State v. Linnehan, 197 N.J. Super. 41 (App. Div. 1984), certif. den., 99 N.J. 236 (1985). In Linnehan, we held specifically that a defendant charged as a third offender under N.J.S.A. 39:4-50 was not entitled to a jury trial, stating:

Persons charged with crime are constitutionally entitled to trial by jury. Those charged with petty offenses are not. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L. Ed. 2d 491 (1968). The New Jersey Supreme Court has held that the only reliable test for distinction is the severity of the authorized punishment, and that jury trial is not required unless the maximum penalty to which the defendant is exposed exceeds $1,000. State v. Owens, 54 N.J. 153 (1969); In re Yengo, 84 N.J. 111 (1980). See Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886, 26 L.Ed. 2d 437 (1970). Where factually related petty offenses are tried together whose maximum sentences total more than six months, and the defendant is not offered a jury trial, the sentences may not total more than six months. State v. Owens, supra.Concurrent jail sentences, each of which does not exceed six months, are permissible. Id. 54 N.J. at 163.

The penalty for a drunk driving third offender is a mandatory term of incarceration for 180 days, a fine of $1,000 and loss of license for 10 years. N.J.S.A. 39:4-50. The statutory language, "a term of not less than 180 days," was not well chosen. However, we are satisfied of the legislative intent and we adopt the reasoning of State

v. Ferretti, 189 N.J. Super. 578 (Law Div. 1983) in this regard. Defendant was ordered to be jailed for a total of 200 days less 90 days of community service, or a net 110 days. Since his total sentence exposure was to incarceration of not more than six months and a fine of $1,000, and his actual incarceration will be less, there is no constitutional infirmity. [197 N.J. Super. at 43].

See also State v. Owens, 54 N.J. 153 (1969), cert. den. 396 U.S. 1021, 90 S.Ct. 593, 24 L.Ed. 2d 514 (1970); Landry v. Hoepfner, 840 F. 2d 1201 (5th Cir. 1988); State v. Roth, 154 N.J. Super. 363, 366 (App. Div. 1977); State v. Nemesh, 228 N.J. Super. 597 (App. Div. 1988).

Accordingly, the judgment under review is affirmed.

STENOGRAPHIC TRANSCRIPT OF MUNICIPAL COURT APPEAL PROCEEDINGS - APPEAL NO. 277-87 - STATE V. DONALD HAMM - MONMOUTH COUNTY COURTHOUSE, FREEHOLD, NEW JERSEY. THURSDAY, FEBRUARY 11, 1988 BEFORE THE HONORABLE LAURENCE C. STAMELMAN, J.S.C. APPEARANCES BY GREGORY SCHWEERS, MONMOUTH COUNTY PROSECUTOR AND MICHAEL R. SPECK, ESQ. (OF FRANCIS X. MOORE, P.A.) FOR THE DEFENDANT. PAGE 9, LINE 19 THROUGH PAGE 12, LINE 10.

THE COURT: Okay. The defendant in this matter was arrested on August 10th, 1986, by Officer William Rett of Manalapan Township.

The defendant's attorney subsequently appeared on April 9th, 1987 in Marlboro Municipal Court.

On April 9th there were to pretrial motions made by the defendant's attorney. The motions were denied by the

Municipal Court. Subsequently, there was a trial which continued on several dates.

After lengthy testimony a constitutional plea of guilty was entered subject to reservation of the defendant's pretrial motions.

The Prosecutor and the trial court both agreed and the trial court accepted the defendant's conditional plea.

There was a motion regarding the sentencing of the defendant as it relates to the burden of the State to prove the validity of the prior convictions. That motion was denied by the Municipal Court.

The defendant raises the following questions, namely, the right to a jury trial under the Sixth Amendment. The defendant had two prior convictions for driving while intoxicated and as a third offender he was subject to $1,000 fine and costs and a $100 surcharge and a possible imprisonment up to 180 days and a 10 year revocation of his license.

I find that the argument made by the defendant for a right to a jury trial is not proper.

This Court is bound by the decision of State v. Lenihan, 190 N.J.Super 516, decided in the Appellate Division 1983. Certification was denied in 99 N.J. 236 by the Supreme Court in 1984.

In that case the Court found that there was no right to a jury trial involving a defendant who was faced with a third conviction for driving while intoxicated. So that case, State v. Lenihan, is controlling and, therefore, I find the defendant is not entitled to a jury trial.

The defendant also argues that the penalties involved as a result of a conviction for a third offense of driving while intoxicated constitutes cruel and unusual punishment.

This issue was decided by the case of State v. Housman, 131, N.J. Super 478 (App. Div. 1974) where the Court held that the penalties under 39:4-50 do not violate

the constitutional provision against cruel and unusual punishment.

So this Court is bound and I am bound by the decision of State v. Housman and I find that there is no basis for the argument made by the defendant that the penalties involve cruel and unusual punishment and violate the Federal and State Constitution.

Just so I am clear here, Mr. Speck, there was also some argument made as to the two prior convictions, right?

MR. SPECK: Yes, Your Honor.

TRANSCRIPT OF RECORDED PROCEEDINGS - MARLBORO MUNICIPAL COURT, APRIL 9, 1987 BEFORE JAMES M. NEWMAN, J.M.C. - JOSEPH WINDMAN, ESQ., ATTORNEY FOR STATE AND FRANCIS X. MOORE, ESQ., ATTORNEY FOR DEFENSE. - PAGE 16 (LINE 24) THROUGH 48 (LINE 19)

MR. MOORE: And, therefore, that can be dealt with at the completion which is a post-trial motion. Therefore, that would leave the pretrial miranda, the Demand for the Trial by Jury and the Notice of Motion to Dismiss for Cruel and Unusual. The -- if I can take those two together, the Jury Trial and Cruel and Unusual, both of those, I would respectfully submit, involve what may be coined Constitutional in nature since they are, I fully recognize I want Your Honor to understand, that the Court is limited in it's jurisdiction to be able to determine those issues. In any event, I also would respectfully submit to the court that since they both involve probably a perhaps stipulated set of facts, I think I can argue one and then the other at the same time with Prosecutor's permission since it probably would not need repeating. In that direction, let me start by arguing the issue concerning Cruel and Unusual Pun-

ishment first and then go directly into the Demand of a Trial by Jury. In this state, the defendant who is charged with 39:4-50, 39:4-50.2 and 39:4-97 suffers certain penalties which are consecutive in nature and individualized to the individual offense. Under our Constitution and the United States Constitution, there are prohibitions against the imposition of cruel or unusual punishment. The punishments, of course, in most cases -- in this particular case are mandatory. There is very little discussion within the confines of the Court's variable parameters within which the Court can guide itself. And under the Eighth Amendment of the United States Constitution and paragraph 12 of our own Constitution under Article 1 in New Jersey, that cruel or unusual punishment has been determined and probably the standard case of State versus Smith which is at 58 NJ and very simply put that specifically recites that punishments may not be grossly disproportionate to the severity of the crime. And then, of course, it later, the United States Supreme Court acted in a similar fashion in Greg versus Georgia, 426 -- strike that 428 US in 1976. In any event, there are presently no less than 14 punishments imposed against a defendant who is convicted for drunk driving. In this particular case, we are dealing, if it please the Court, with a third offender. The penalty: One, seven penalties imposed by the Court, seven penalties imposed as a result of the judicial determination and seven penalties -- the power to impose seven penalties on the Director of the Division of Motor Vehicles. There are 21 totally. The last seven are rather simple. As a matter of fact, in examination of Judge Haines' recent decision in State versus Lach, L-a-c-h, recites those seven almost in (indiscernible). Of course, he's dealing with the issue as to discovery in a careless driving summons but the bottom substantive line is the reason why he's granting the application is because those seven penalties in that third category are -- can be

imposed against the operator of a motor vehicle who's charged with careless driving. So, that's simple. Those seven are there and they're listed as a matter of law in Lach. The first seven, revocation of his driving privileges for no less than 10 years. Incidentally, the Statute doesn't give a maximum. It is conceivable that the Court may very well be in a position to impose longer than that. Two, no less than 180 days incarceration. Incidentally, it says exactly in that fashion, no less than. Therefore, there is no maximum recited in our Statute. Under 2C when we adopted 2C in '77, it recited that where there is no specificity as to the maximum listed within the confines of the Statute, the policy shall be to examine the next higher offense and determine what the minimal penalty is for the next higher offense in order to determine a maximum. Well that, obviously, creates additional confusion because there is no higher offense than 39:4-50 in the motor vehicle Statutes. Therefore, conceivably, where it says no less than, it is an open-ended Statute and that, therefore, it's 180 days. Three, he suffers a fine of no less than $1,000.00. Four, he is in the position where he has to pay a surcharge of $100.00 to the Court under the DWI defense fund. Incidentally, from my point of view, I respectfully submit, that is nothing more or less than a fine or a bounty since I'm sure those who have examined the Statute recognize that $95.00 of that can be returned to the arresting department in the event an application is made, $5.00 remains as administrative cost for the Division of Motor Vehicles. That's no more no less than a bounty. Five, that the defendant has to spend two days at the Intoxicated Driver Resource Center. Those two days are -- thank you very kindly -- those two days are two continuous days or 48 hours. Incidentally, at that moment he is, in fact, in the -- at that moment those two days are extremely -- it is clear that those two days are, in fact, custodial days. That is to say that one of the impositions

at the time he either is found guilty or pleads guilty is that he must sign a waiver with the Court acknowledging that he will be incarcerated for two days each time he fails to appear at the Intoxicated Drivers Resource Center. So, obviously, we are now at the point where we're up to 182 days, not simply 180. In addition to that, I would respectfully submit, are the seven penalties imposed against him at the time is the penalties as to acknowledging the position as to subsequent offenses. In other words, he is taken out of the category of the prior offender and any subsequent offense would include the enhancement of which has been provided in our Statutes since January 12th of 1982. There are, in fact, seven penalties imposed against him as a result of that judicial determination of guilt when he leaves the courtroom. One, he is placed on the alcohol registry in the Division of Motor Vehicles Alcohol (indiscernible) Program. Two, he must, in accordance with that program, take a class one night a week for 16 weeks at a local Division of Motor Vehicles Station, local community college and, in fact, Drivers Resource Center. Three, he must pay the Division of Motor Vehicles for that course and for the restoration succeeding that cost of approximately $170.00, again, fine. He must, of course, pay a surcharge of $1,500.00 a year for a subsequent offense for a total of $4,500.00 over a three year period to the Division of Motor Vehicles. He must, of course, pay $50.00 a day for the Intox Drivers Resource Center at least two days. He must in addition to that, if it please the Court, and our Statute provides for it although I recognize it has not been enforced because it becomes almost (indiscernible), he must pay $25.00 a day for going to jail. We live in a peculiar state. You pay to go to jail in this state. At the rate of $25.00 a day. So, if the Court did impose a jail sentence conceivably of ten days, well that's easy to figure because he's got $250.00 that he owes the Division of Motor Vehicles. The problem when it is a third

offender is where he's having 182 days imposed, it has never been secured, obviously, because the amount of money would build another jail that they would receive from third offenders. In any event, in addition to that, he is shrouded with an additional penalty that if he drives during any period of suspension, each of the offenses which he is charged with double including the enhancement of 39:4-50 if he were so inclined to be convicted of that subsequent offense. He would also, of course, be subjected to multiple penalties under enhancement for 39:3-40. Now, if you took the total of those penalties, it seems extremely clear from the point of view of the Court's being in a position to decide whether or not it's cruel and unusual that there is no other violation in motor vehicle statutes that can compare with the penalties that can be imposed.In addition to that, in this state you can commit some forms of arson, some forms of burglary, some forms of larceny, some forms of assault, all of which, believe it or not, create a presumption of non-incarceration. All of our third and fourth degree crimes under 2C have a presumption of a lack of incarceration. It becomes the burden on the State to seek it, not the defendant's burden to defend against it. And obviously, I would respectfully submit, therefore, in this state we have crimes of the third or fourth degree in which the penalty is less than the mandatory penalty for drunk driving. If that be the case, the question then arises as to whether or not that may be considered, according to Smith, as grossly disproportionate. The second issue is, if you are determining the issue of the gross disproportion, we have a Statute in which the Court is bound to the mandatory impositions without concern for whether or not the person driving the automobile number one, was parked on the side of the Garden State Parkway at the time he committed the offense or he drove down the roadway and destroyed property or injured people, the penalty is the

same. From the point of view of the third offender, they are no less than without providing for the maximums. Obviously, therefore, the questionable validity under cruel and unusual punishment provisions exists again because there is no discretions in the Court to impose. Now, that may very well exist as to a first offense where there is a discretion between and amongst. But it does not exist as to the third offense where there are minimals but no maximums. Therefore, it is a flat blanket. Now, in addition to that as to this particular defendant, he faces, of course, penalties with relationship to the 39:4-50.2. And there are peculiarities as to that. The peculiarities, of course, being that we have case law to have interpreted that to have meant that the same penalty can be imposed for 39:4-50.2 that can be imposed for 39:4-50 as far as the Division of Motor Vehicles is concerned from the point of view of the surcharge. As a practical matter, even though that is the case law, the Division of Motor Vehicles, of course, has not been expending but they have the power to which conceivably would mean that he would be paying $3,000.00 for three years or $9,000.00 if he paid the surcharge. The compulsive imposition of sentence is a $500.00 and an additional revocation. Now, I'm sure we recognize that you cannot impose those penalties dealing with incarceration for a violation of the refusal since it is simple in nature. The third, of course, is the careless driving charge and there is a consecutive imposition of sentences to that, also. As to those penalties, I would respectfully submit, rather than go through them, suffice it to say that and Judge Haines does it better than I could in State versus Lach in which he recites them with specificity the seven that are imposed by the Division of Motor Vehicles. Obviously, therefore, I would respectfully submit, that it seems very clear that the penalties are cruel and unusual and I would, therefore, respectfully submit that the Court should have the power to dismiss. Now,

again, what did I say, remember what I said, I recognize that there is a limitation placed upon Your Honor. But I also recognize that the case law in this State, both State versus Ingerman and Romano, required of this defense counsel, defense counsel must assert the Constitutional right prior to the trial even if it is a fruitless effort, so to speak so that it is recorded and he has the availability of being able to assess that argument again when he reaches, for the sake of a better term, the Superior Court, the name bothers me in calling it upper or lower or anything like that. But, in any event, that Court in which those people sit who think that they have the capacity to make Constitutional judgments for one reason or another in the discussion of the legislature. In any event, the second issue is the Jury Trial and if counsel is patient I'll run right into it because it takes the same facts and circumstances if that's all right? Great. Now in dealing with the Jury Trial issue, the question arises as to when is a defendant entitled to a jury trial. There probably have been two outstanding in out of state Supreme Court cases dealing with that same issue, Duncan versus Louisiana and New York versus Baldwin, following in sinc almost. And Baldwin probably gives the history as to jury trials much more formidably than any other case.And in dealing with Baldwin and Duncan-Louisiana, it appears that historically there were three categories of cases which were granted jury trials from the beginning. One was what was commonly called an oral threshold test. Is the imposition or power of the Court in excess of six months and over $500.00? The answer to the question is that the Court in a third offender gives more than that now statutorily. But what they found out in the cases preceding Baldwin and Duncan was that, wait a minute, if the Court does not impose the six months, then can he take away the defendant's right to a jury trial? What they obviously realized is that the Constitutional right does not belong

in the whims of the judiciary. That it belongs to the defendant who is shrouded with that right the minute he stands before the Court and not the judiciary. So that the second beginning of the historical, the significant issues was a bright line test of six months and $500.00 statutorily. So, if you had a statutory threshold in which they said, wait a minute, if the legislature imposes a six month revocation and a $500.00 fine, no jury trial but the minute you step over either of those, you're entitled to a jury trial. Now that was called the statutory bright line test. But then they realized that that was a mistake also. Why? Because obviously you are now taking away the discretion under the statutory bright line test. But then they realized that that was a mistake also. Why? Because obviously you are now taking away the discretion under the old threshold that you gave to the judiciary to say, I'm not going to give you six months or more so you cannot have a jury trial. I'm going to try you here and I'm going to give you five months and twenty-eight days. They said, wait a minute, how can the legislature do that. Because obviously, you are now taking away the discretion under the old threshold that you gave to the judiciary to say, I'm not going to give you six months or more so you cannot have a jury trial. I'm going to try you here and I'm going to give you five months and twenty-eight days. They said, wait a minute, how can the legislature do that? Because if you give the power to the legislature, you are taking away that Constitutional right the defendant is shrouded with and the legislature can then create a condition under which a jury trial can be granted or not. As a ludicrous example, undoubtedly, the legislature in Alabama could say, if a black man commits rape against a white woman, his penalty will be six months and no more But if a white man commits rape against a black woman, he will have a jury trial because his penalty can be one year. Now, from a physical examination you say, my heavens, there's

something disjointed about something of that nature. Sure there is. The point is from appearances it is imposing a heavier sentence on the white man. But what it is, in fact doing, is taking away from the black man the right to a jury trial by making that bold, bright line test, the limitation as to his right to a jury. And obviously, therefore, they began to realize as is clearly reflected in New York versus Baldwin, you cannot shroud the legislature with that power because the legislature then could say, for smoking in a public building, six months, for smoking in the Judge's Chambers, six months and two days. In other words, you cannot give the power to the legislature because then you are giving the power to the legislature to determine that the Constitution can only apply when we say it applies. So, obviously, when New York-Baldwin came about, New York-Baldwin clearly said, wait a minute, the third category of the historically significant jury trial right is primary. What is it? Baldwin says, you determine whether or not society at the time believes it is a serious offense. That's Baldwin. Incidentally, when you deal in New Jersey with the cases that have come down dealing with jury trial, you are obviously provoked to see Owens, Zoppe, Lenihan, in that order. And when you deal with Zoppe, to give you some idea of the characteristic of how much error was committed. Zoppe, in fact, did what I just told Your Honor was the second historically significant bright line test because Zoppe came back and said, wait a minute, if you have compulsive penalties which exceed six months, the Municipal Court Judge cannot impose them, even if they're mandatory. So, if a defendant is charged with drunk driving, third offense, and driving on the revoked list for a prior in which somebody is injured, both of which involve mandatory penalties, as a result of them being consecutive, it exceeds six months. So, Zoppe comes down, apparently the Appellate Division thinking they had the

power to do it, and says no Municipal Court Judge can impose in excess of six months because the minute he does, the case must be dismissed because at the beginning he didn't give the defendant his right to a jury trial. Obviously, by saying it in that fashion, the ridiculous logic that they applied - thank you - the ridiculous logic they applied is somewhat clear. You get to Lenihan and when you get to Lenihan it is shocking and surprising that a Constitutional jury trial issue could take the court one page of the green book to resolve an issue. And in conclusion, and this is the magic that I think perhaps of this type of an argument and the difficulty it has created with those of the Appellate reviewers who lack the courage to be able to admit a condition may exist. Judge Matthews sitting for the three judge panel concluded in 1986 drunk driving is nothing more nor less than a petty motor vehicle offense. Well, I said it fast and I think when you read the opinion it's kind of like he's trying to say it fast because it's obvious that what he's attempting to avoid is the little old ladies with picket signs picketing in front of his Chambers. Undoubtedly, it is scary to me that, and I recognize, that we have perhaps eight or ten cases on the books at the present time within the past year which clearly say, wait a minute, drunk driving is such a serious offense that there are times we will even waive a Constitutional right because it is so serious and then in the same day well, if that means we're going to give a Constitutional right to a jury trial, let's call it a petty motor vehicle offense when it gets to a jury trial issue. But if it gets to host liability and if it gets to any other issue, let's call it a serious, devastating offense. It is time, perhaps, that we, as lawyers, who become judges, should stop laughing up our sleeves. We're going to get caught in the middle. Some bright member of the public is going to say, wait a minute, you are talking out of both sides of your mouth. If it's serious enough to hold a liability to the

individual private host, if it's serious enough to create a dram shop rule that limits liability as to liquor establishments, it it's serious enough to make certain that $1,000.00 a year by 43,000 people is paid every year, after three years you now have one hundred and twenty-nine million dollars, please do not tell me that's not serious. Most especially, if the reason why you're telling me it's a petty motor vehicle offense is so that you can avoid giving that one defendant his constitutional right to a jury trial. Hear how idiotic it is. New Jersey has survived. We are one of two of the 50 states that does not give the defendant a jury trial in drunk driving. Shocking. Amazing. They have protected that right like it is absolutely almost their constitutional right. It belongs to the defendant. Here's how ludicrous it is. Not only 48 states give you a jury trial but under Title 18 if you commit the same offense on government property, you get a jury trial. As ridiculous as this sounds, if I were driving down Route 35 in Eatontown, New Jersey and I saw the cop following me, being as bright as I am I would make an immediate left hand turn into the west gate at Fort Monmouth and speed like a son of a gun. And then when I was apprehended, I would insist upon being relegated to the jurisdiction of the government reservation at Fort Monmouth. What I just did was gain a constitutional right by crossing a geographic line. I would submit to this court that that condition to exist becomes ludicrous. Most especially in a state that has McGuire Air Force Base, Fort Dix, Fort Monmouth, Picatinny Arsenal and five buildings which have a parking lot in them that if you are arrested in a parking lot you get a jury trial but the minute you hit the public street in Newark you lost it. So, if you were drunk driving in the parking lot and in this state it's conceivable you could have been arrested for it because they've

prostituted it to the extent that it clearly includes now private property, there's no question about it, the farmer mashing up his beets can be hit as heavy as anyone else. In any event, obviously, therefore, the question as to whether or not the defendant is entitled to a jury trial becomes -- is it that serious in society. You know, we can't put blinders on. If we at least want to look at it and be honest with ourselves, I have not seen a day go by in which some portion of the media, either written word or the visual capacity on news programs, causes us to see something dealing on a regular continuous basis with drunk driving. Every day. And we do see that the circumstances dealing not only, if it please the court, with cars but with trains and planes and with etc. and with etc. If it were not so serious, why in fact, would they be invading on the privacy of an individual to seek blood tests and drug tests. Why, because it is serious. Maybe, just maybe -- maybe the Haines case is the one that says, stop, because it is different than was Lenihan. It is different than was Zoppe. Remember, Zoppe was a combination of 4-50 at a time in the early 1980's when there was not the imposition of the additional penalties which have accrued over the course of the last two years. So too was Lenihan in that category. Now, if you use the magic formula of Zoppe, and I got to say in Judge McGann's Opinion he clearly recites, there at some day will be a problem, gentlemen, because if we do afford the defendant the right to a jury trial which may at some time be determined, procedurally we are going to have to be in a position to be able to satisfy the requirements of the public to dispose the matters by jury trial. What he was obviously saying is the administration is of concern. My position tonight, I would respectfully submit, is so what? If what they mean is government bears an additional expense to protect the constitutional right, we've been doing it for 200 years and we ain't done bad. And if one

more right to be protected is given a government and government is encouraged a problem in having three additional prosecutors, so be it. I can tell you what they're worried about. What they're worried about is the attempt to control the Municipal Courts to the extent that they say, you cannot plea bargain, Judge, but when you get to the Superior Court, you plea bargain everyday. They know that. They're fully familiar with that. Obviously, I would respectfully submit, I would think the administration would move so rapidly it would scare them to death with a plea bargain on third offenses. Most especially since most county prosecutors have no idea of what's going on down here. They probably would be better if they reached and hired five or six municipal prosecutors who are much more talented than they are (indiscernible). I recognize, of course, that I probably will be criticized for saying that. I really don't care. It won't be the first time and I'm sure that one of the Chief Justices said that I shouldn't have said something but I'm still saying it. So, whatever caution they gave me, I reasonably suspect that either through ignorance, accident or intelligence I'm not abiding by it. In any event I, therefore, respectfully submit that the defendant is entitled to a jury trial. Now, let me explain something to Your Honor so that there's no mistake in Your Honor's mind, I argued Zoppe. I argued Lenihan. As a practical matter, they never went through the Federal system for very practical reasons. For some reason, as soon as we got to the point where it appeared as though we were on the scales of justice and it seemed as though the balance was moving, an offer was made of disposition and as a result of the ethical function that I had to turn around and offer that to the defendant and the defendant found out he wasn't going to jail, he was drooling (indiscernible) to take that principle any further, that obviously the principle to protect your constitutional rights goes so far as the county jail. And when the door

is slammed, the principle is much more magnified that if the doors don't slam. I'm sure as a practical matter, and I complement the Attorney General's Office, they knew that when they dealt with me, they dealt with someone who ethically had to turn to his client and tell him what the offer was and as a result of the offer being (indiscernible) the defendant, they stopped a possible problem of, perhaps, four years or five years. But all they did with somebody like me was to delay it. At some point it's going to have to be resolved and it's going to have to be resolved to the point where you will not be able to make a deal with somebody. You will not be able to force the lawyer to stop raising a legitimate legal constitutional issue in front of the Federal Tribunal at some point, at some point. I think that point is now and I would ask the court to make certain that the record is clear that I am entitled to a jury trial. I'm sorry I took so long.

THE COURT: Thank you, Mr. Moore. Mr. Windman.

MR. WINDMAN: If it please the court, the State is overwhelmed by the irradiation by counsel. It is almost refreshing to hear such knowledge of the law. And I congratulate counsel for being so well learned. Getting back to the Hamm matter, Your Honor, it is my understanding of the argument in its simplest terms regarding cruel and unusual and also the jury trial, I think, too, because both are innessed upon the same argument that the exposure and the, as counsel said, the disproportionate severity to the defendant for what he has been charged due to his own actions creates a proper argument of cruel and unusual and the request for the jury trial. Unfortunately, for counsel and as he has stated very forthrightly, is that the court considered it no more than a motor vehicle offense. As he has stated, this is not Montana or North Dakota which would give the defendant a jury trial. This is New Jersey.

He does not have access to a jury trial in a, as he stated, a "petty motor vehicle offense". The enhancement provisions of the statute is to protect society but again, it does not raise to the point that it would be cruel and unusual and, again, does not raise to the point to give the defendant a jury trial. Again, I would thank counsel for such an education and that he knows so well without referring to his notes to give such and education and be so erudite. But it's unfortunate his client cannot have what counsel has requested. I thank the Court.

THE COURT: This court is charged now with hearing two out of three pretrial motions. The two which are before the Court are what, as counsel for the defendant aptly put, constitutional issues. There has been great debate in the Municipal Court and the State Court system as to the jurisdiction of the Municipal Court. And in Chambers, counsel, again, pointed out the debate on this committee has been back and forth as to whether this Court can deal with the constitutional issue, is this Court a Constitutional Court? Having just completed the course for "New Municipal Court Judges" which was held in Princeton about a month and a half ago, the issue was presented at that time with Chief Justice Wilentz and various of the lecturers at the seminar. We're not a Constitutional Court yet, we decide Constitutional issues on a daily basis. We issue search warrants. We hear motions to suppress. We hold probable cause hearings. Yet, "we're not a Constitutional Court". The statement has been very clear. We are a Constitutional Court but somebody has said that certain issues maybe you can't decide when they're put forth to you in the broad sense of the matter, this is cruel and unusual punishment, this is demand for a trial, this you have no jurisdiction, you have to refer it up to the Superior Court. But on other respects, you can decide bench warrants, you can decide search warrants, you can

hold arraignment hearings, you can do all the other things the Constitution allows except these small limited issues. And maybe during the time of my tenure on the Municipal Court bench we'd see some clarification of just what the jurisdiction is or, you know, whether the state will accomplish itself in the complete merger of the system and take it over completely and delegate to the Municipal Court trail by jury or take trial by jury out of here which it isn't in here anyway and take these type of offenses out of here. Clearly, the argument by counsel, and he does point out 48 of the 50 states there is a trial by jury, and my understanding is there are several cases pending now in the Appellate levels of this system again trying to force the issue of a trial by jury. I think counsel may even be representing some of the cases that are now pending before the Appellate or the Superior -- the Supreme Court. The fact of the matter is I am faced with the duty as set down by the Courts in the decisions of this Court, of the Supreme Court in the State of New Jersey and the Appellate Division which I am bound by at this point as far as my reading of the case law and my reading of the jurisdiction. I find that the cases hold as a matter of law in the State of New Jersey that, in fact, the defendant is not entitled to a trial by jury. Whether this matter will eventually be overturned and if the case does finally reach the Federal System, it very well may be a different set of facts that I'm faced with. But certainly as "the lowest Court in the State" and without being demeaning to my Court or to anything else in the Superior Court in terminology that so represents, I have no choice but to deny the motions as presented by defense counsel and hold that this trial will continue as a trial without jury. I also find for whatever purpose it may serve whether I have jurisdiction or no jurisdiction that I do not feel the penalties imposed by the drunk driving Statute and the related Statutes constitute cruel and unusual punishment. I find, as a

matter of fact, that, in fact, the penalties, even as they "go up" as in a third offense are penalties which fit the crime. Whether that gives on the other breath and on the other side of my mouth, the question whether that gives rise to a trial by jury that the highest Courts of this State have ruled that it does not and it's by those decisions I stand so bound. With regard to counsel's next Motion which I am going to take the privilege of cutting counsel short and not even letting him argue the motion. I am going to grant the motion for the miranda hearing.

MR. MOORE: Thank you, Your Honor.

THE COURT: And we'll make that real easy. That Miranda hearing will be held immediately preceding, if, in fact, we decide there is a trial, on the date that this matter is so next scheduled.Again, I understand that counsel has certain obligations with regard to an Appellate process based upon the bench warrants I have issued, so be it. I will state, for the record, just one more time. There's certain contempts that this Court has seen over the period of time. I understand what might be extenuating circumstances in Mr. Hamm feeling the Alzheimer's Disease and any other pressing matter with regard to his father, and I don't mean to belittle or indicate that that is not a pressing serious matter that needs attention. The basis, so everyone understands it and it's clear, for my issuance of the bench warrants and the contempt proceeding is that this case, if my recollection serves me correctly, was probably scheduled early March or late February with the specific understanding in an open Court that I would make the arrangements that I have made to keep this courtroom totally clear in order to dispose of a case that has been sitting for quite an extended period of time, not through any fault of anyone, specifically, mother nature and other related events. We'll leave it at that. However, it was clear

that this case was on. It was also clear at that time the case in Kentucky was not on as Mr. Hamm was here and did not indicate at that time that there was any conflict. It also is clear to me from the facts that have been presented to me that the scheduling of the case in Kentucky occurred sometime toward the latter part of March. And there's no question that immediate contact was made with this Court in an attempt to put off this particular matter. The problem that bothers me is, the contact should have been made with the Court in Kentucky to put off that matter, not for weeks, months, whatever, but for a day or two or schedule it two days earlier so it would have been done today. First of all, I assume the trial is continued in Kentucky 'till today. I'm not sure of that either. I know it was scheduled to start yesterday and for all I know, it could be completed yesterday and the defendant didn't have time to get out of Kentucky. That fact remains unclear to either one of us, I think, because I don't think you've spoken to your client this morning. And in this indication, I can tell you in a conflicting conversation with the Court Clerk, it was he's in Kentucky but if he had to he would get here which I find that rather difficult. He said he could get here this morning. I'm not quite sure what that meant. I don't know if that meant he came home from Kentucky at three in the morning and he's exhausted and doesn't want to get out of bed and he's really here or he had tickets for a nine o'clock flight and he'd get here at twelve thirty. That was the statement that was made to Mrs. Dunn, the Court Clerk. So, that leaves me again in an empty situation. But I couldn't have made it clearer to counsel and I guess it was Mr. Hamm that called himself, was it not who spoke to the Court Clerk with his own ears and was told the feeling of this Court with regard to his non-attendance here. Yet, for whatever reasons and they're only known to him at this point because they were never transmitted

to either counsel or to this Court, he chose to not put off the case in Kentucky for any period of time, proceed with that and allow this Court to sit here empty today. That, to me, is the most contemptuous conduct of all. And it's for that reason that I have come down what I consider hard, but allowable, under the Statute on my discretion to issue a bench warrant on the three respective charges and the bail that I have so done. And it is for that reason I will not stay my bench warrants. If the Appellate Division or the Superior Court Judge feels there is sufficient basis to stay the bench warrant and justice will be served, that will be his decision. This Court is appalled. And, again, that is why I have done what I have done. Are the copies of the bench warrants available for Mr. Moore? They are available to you and you can do what you have to do to protect your client as you see fit. I, again, thank counsel both for their time and effort and at least we accomplished something up until today. I have one 40 case on my calendar. Mr. Moore, I guess that concludes your matter.

MR. MOORE: Yes. Your Honor, just, if I may --

THE COURT: Sure.

MR. MOORE: So that it doesn't feel like I'm sitting here taking the rap and not feeling, I don't think Your Honor has the power to be able to assert a bench warrant for each of three summonses. The contempt is the contempt of physically appearing on a response date. It wasn't three separate summonses requiring three separate appearances. So, in fact, it is one contempt -- one act of contempt. Therefore, I would respectfully submit, I don't think you have the authority to separate it into the three summonses to place -- I think it's one act of contempt. Now, I think perhaps the only place you probably would find that would be in the commonly called bench book

guideline from the ALC. I don't know that it is part of the rules. But I do know that there is case law that says that for one act of contempt, there can be only one warrant issued. The other is, may I request of the Court that the Court consider the possibility of a contempt proceeding by notice rather than bench warrant? The only reason I'm saying that is because we are not dealing with somebody who just is someplace in parts unknown. He did, at the very least, or at least I produced for the Court, at least a subpoena which appears on its face to have something to do with some foreign jurisdiction, on its face. Now, I don't know whether or not you'd buy them at Flumberg's law firm or are they still around Flumberg forms? I guess --

THE COURT: Yeah. In New York they are still the Bible as Allstate is in New Jersey.

MR. MOORE: In any event, I don't know whether or not that's from one of the pads or -- I can't tell that except that it appears on its face because it appears to have the certification of somebody on the left-hand side bottom.

THE COURT: Mr. Moore, and I don't mean to --

MR. MOORE: Do you understand what I'm saying? What I'm saying is I'm asking the Court to release the bench warrant and set a date for the hearing and serve the defendant with a notice for that date of hearing.

THE COURT: I understand very clearly what counsel is suggesting. I think counsel understands me and I appreciate what you're doing. However, this hearing was set in open court and there couldn't have been a better notice to your client. Your client then requested of this Court an adjournment and that adjournment was denied. He then

chose to do what he had to do. He had to make a choice. He was summoned here. He was subpoenaed there. The only trouble in the case down there as I read the caption is the plaintiff. So, to be subpoenaed to his own case where he's the plaintiff gives me great trial and tribulation. Number two, this is a quasi-criminal proceeding. That is civil in nature. As far as I'm concerned, this takes precedence. As far as I'm concerned for whatever, convenience or other, your client made a willful decision to ignore this Court. That willful decision will be met with the bench warrant. That willful --

MR. MOORE: What I'm saying is I don't think it was a willful -- it was willful -- he was not ignoring your Court. What he was simply saying was I made by choice.

THE COURT:And he made that choice with a specific statement by this Court that this would be the consequence.

MR. MOORE: Yes.

THE COURT: And I promise to carry out what I promise.

MR. MOORE: But I also submit to the Court that my understanding of what I read was he wasn't really a plaintiff. He was a fiduciary as I understood it. Do you understand what I'm saying --

THE COURT: I understand. I also -- if he had produced to me eight letters and attempts by you or by himself to have that matter adjourned and there was letters back from that Court that, in fact, that could not be granted, I might feel different. But in the two week opportunity, all I have is him saying, that's when it is, that's when it's going to be heard and that's what I'm doing. And, now, he will

hear -- I said this is what I'm doing and I am doing it and I will continue the bench warrants the way I say. As you amply point out, there is nothing in the Court rules that prohibit it. It is the practice of this Court on each separate summons to impose what it feels appropriate and so be it and I will face whatever Appellate review I face but I do issue the bench warrants and I so state. You may have a copy to march off to Freehold with.

MR. MOORE: I have it now. Thank you, Your Honor, I really appreciate it.

THE COURT: All right. I thank you, gentlemen, on this matter and I will dispose of the last case on my calendar.

STATE OF NEW JERSEY)
) SS

COUNTY OF MONMOUTH)

I, PHYLLIS BINDER, a Notary Public of New Jersey and Assigned Transcriber, do hereby swear that the within is a true and accurate transcript of the proceedings in the matter of the State of New Jersey versus Donald Hamm heard in the Marlboro Municipal Court on April 9, 1987 and recorded on Tape No. 304AA, Index 0641 to 1311, of that Court.

/s/ Phyllis Binder
PHYLLIS BINDER
A Notary Public of New Jersey

May 27, 1987

CONSTITUTION
of the
UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions --- Provisions concerning --- Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Section 1. Citizens of the United States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.